Supreme Court, U.S.

October Term, 19 67

Term, No. 1700 Misc.

Robt. L. Pruett,

Petitioner,

vs.

Ohio

Respondent's brief in opposition

Filed May 21, 19 68

IN THE

SUPREME COURT OF THE UNITED STATES
NO. 1700 MISC., OCTOBER TERM 1967

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ROBERT LEROY PRUETT,

PETITIONER

-vs-

STATE OF OHIO,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF THE STATE OF OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1700 MISC., OCTOBER TERM 1967

ROBERT LEROY PRUETT,

PETITIONER

-vs-

STATE OF OHIO,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH APPELLATE DISTRICT OF THE STATE OF OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

OPINIONS BY COURTS BELOW

The opinion of the Supreme Court of the State of Ohio is contained in the Petition for Writ of Certiorari, pages 33-35.

The opinion of the Court of Appeals for the Seventh Appellate District of the State of Ohio is appended to the Petition for Writ of Certiorari as attachment to Appendix, pages 1-8 and pages 1-11.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing the appeal sua sponte was rendered on the 20th day of December, 1967, a copy of same appearing on Petitioner's Petion for a Writ of Certiorari to the Supreme Court of the United States, pages 33-35.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT IV - SEARCHES AND SEIZURES -- Set forth on page 29 29 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

AMENDMENT VI - RIGHTS OF ACCUSED -- Set forth on page 29 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

AMENDMENT VIII - EXCESSIVE BAIL, FINES, PUNISHMENTS -- Set forth on page 29 of Petitioner's Petion in Writ of Certiorari to the Supreme Court of the United States.

STATUTES:

OHIO REVISED CODE, Section 2941.30 -- Set forth on pages 30-31 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

OHIO REVISED CODE, Section 2945.10 -- Set forth on pages 31-32 of Petitioner's Petition in Writ of Certiorari to the Supreme Court of the United States.

28 U.S.C.A. 1257 (3) -- Set forth on page 32 of Petitioners Petition in Writ of Certiorari to the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the seizure and search of defendant's motor vehicle, without a search warrant, is in violation of the Fourth Amendment to the United States Constitution, and whether admission of evidence obtained from said search in the trial of the cause constitutes reversible error.

2. Whether a statement against interest, obtained from a person during a general inquiry into an unsolved crime and when the investigation has not begun to focus upon said individual, may be properly accepted in evidence.

3. Whether a prospective juror, who during voir dire states that he has discussed the case pro and con prior to trial and further states that he has no opinion as to guilt or innocence, may be allowed to serve as a juror at the trial of the cause.

4. Whether an indictment for murder may be amended by insertion of words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape", and whether such amendment is a change in the name or identity of the crime charged.

5. Whether, in the trial of a criminal case, evidence may be introduced in rebuttal by the State to meet a claim or theory of the defense, and whether, if such rebuttal evidence is admitted, the Trial Court must, as a matter of law, allow introduction of surrebuttal evidence.

6. Whether the imposition of the death penalty upon the defendant as a consequence of the State's conviction of murder in the first degree without a recommendation of mercy, is violative of the Eighth Amendment of the United States Constitution which prohibits the infliction of cruel and unsual punishment.

7. Whether the exclusion of several prospective jurors on the sole ground that they are opposed to capital punishment prevents the defendant from having a fair and impartial jury trial.

STATEMENT OF THE CASE

It should be noted that all references hereinafter made to the record refer to Volume 2, unless otherwise noted.

The defendant was charged by the Grand Jury of Ashtabula County at its September, 1964 term with murder in the first degree for the killing of Susan Osborne, while in the perpetration of a rape or attempting to perpetrate a rape on or about September 15, 1964. As is stated in the defendant's brief herein the words "or attempt to perpetrate a rape" were added to the indictment by interlineation by order of the Court (R. 590-591).

On September 19, 1964, the body of a dead girl, later to be identified as the victim, Susan Osborne, was discovered by a young boy and his father in a wooded area South of Lake Road near Lake Erie in Ashtabula County. The body was near a lane which traveled South from Lake Road to a dead end. The body was approximately 100 feet from Lake Road and approximately 15 feet from the lane, and because of the vegetation overgrowth, it could not be seen from the lane or from Lake Road.

Upon the discovery of the body of the victim the police were summoned, the area was roped off, the Coroner was summoned, and photographs were taken. In all of the preliminary testimony regarding the finding of the body, all witnesses stated that the body was not touched or moved in any way until after the photographs had been taken. The photographs which were admitted into evidence show the difficulty in observing the body from the lane, the condition of the terrain in which the body was found, the position of the body when found, the condition of the body when found, the clothing found near the body, and the condition of the various injured and identifying parts of the body. These photographs showed that the body was nude, lying upon its back, that the legs of the victim were spread, and that the body contained a puncture wound in the upper chest and severe damage to the face. Maggots had contaminated the open cavities of the

body.

The body was examined on the scene by the Coroner, Dr. John Higerd. He found the body to be in the condition as above described and found a bruise over the left hip, a bruise over the right hip, and streaks of blood running from the wound in the chest over the upper portion of the chest and the right shoulder. (R. 102, 112). Among the clothing found near the body was a blouse and a brassiere. The blouse had a small cut in it which corresponded with the wound in the chest of the victim. Both the blouse and the brassiere were encrusted with blood. (R. 123, 125). Death was caused by lack of oxygen due to the damage to the face and throat and the clotting of blood. (R. 146). The victim lived at least 45 minutes after the injuries were inflicted. (R. 149). The victim died at Whitman's Creek, North Kingsville in Ashtabula County, Ohio were the body was found (R. 149) between 4 and 5 days prior thereto. (R. 149).

At the County Morgue in Ashtabula an autopsy was performed on the body of the victim by Dr. Jason Dixon on the evening of September 19, 1964, commencing at about 9:45 P.M. (R. 198). Dr. Dixon is a pathologist at the hospital and had performed at that time approximately 1600 autopsies. (R. 197). Dr. Dixon found in the vagina of the victim a substance which contained an extremely high acid phosphatase content. (R. 208). Dr. Dixon testified that semen had one of the highest concentrations of acid phosphatase and that there was no way that acid phosphatase would be found in the vaginal tract other than by artificial insemination or normal sexual intercourse. (R. 208, 209). Dr. Dixon testified that the victim had had intercourse within 12 hours of the time of death. (R. 210). The doctor testified that he found no spermatozoa and that the absence of spermatozoa could not exclude sexual intercourse. (R. 206). Dr. Dixon testified that in his opinion the decedent had died approximately 4 days prior to the autopsy. (R. 211).

The victim's mother, Mrs. Rantamaki, testified that the victim had completed her menstrual period on Monday, September 14, 1964, (R. 176). Normal menstruation would have eliminated any evidence of intercourse had prior thereto. The blood encrusted upon the blouse of the decedent at the hole in the blouse which corresponded with the wound in her chest, was found upon an examination at the FBI Laboratory in Washington (R. 558) to be type B, the same as that of the decedent. The blood on the brassiere of the decedent was found to be human blood but it could not be typed. (R. 565).

The defendant was 26 years old at the time he committed this offense. He had married his 17 year old wife in Las Vegas a few months before coming to Ashtabula County to live with his mother-in-law in Conneaut. He and his wife were working in Las Vegas and earning approximately $180.00 a week. (R. 695). They arrived in Conneaut with no employment arrangements. They lived with the mother-in-law and paid no room or board, other than work performed around the premises. The defendant testified that he had been in jail in Oregon for violating probation and that he had served in the Armed Forces during which time he had 3 court martials and admitted to being AWOL on numerous occasions. (R. 736).

The defendant purchased a 1953 Ford a few weeks prior to September 15, 1964. At the time of purchasing the automobile, he was employed at Manpower Training School in Ashtabula, Ohio. His wife was employed as a baby sitter at the time of the death of the victim in Ashtabula, Ohio. On Thursday, September 10, 1964, the defendant and his wife met the victim and a girl friend of the victim, Ann Kent, who was then known as Ann Shackel, her mainden name, at or near a tavern in Conneaut. (R. 227). The defendant and his wife, the victim and Ann Kent and two other men purchased some beer and went to a beach near Conneaut where the beer was consumed. At or near midnight on that night the party, with the exception of one of the men, returned to a bar in Conneaut at which the decedent danced with the defendant on two occasions. (R. 231).

Defendant purchased drinks for the victim on that evening.

On the night of Monday, September 14, 1964, the defendant and his wife and a man named Norman Balcomb and the deceased made the round of several bars in Conneaut. During the evening Mrs. Kent saw the defendant on several occasions. The last time that Mrs. Kent saw the defendant and the victim was at about 11:30 P.M. in downtown Conneaut. At the time the defendant and his wife were seated in the front seat of the defendant's 1953 Ford and Balcomb and the deceased were seated in the back seat. The deceased asked Mrs. Kent to accompany them and she refused. (R. 240).

During the course of the evening of September 14, 1964, the defendant stated to Balcomb that he had "got in her pants" regarding the deceased. (R. 287). On the same evening he also told Stanley Pachkowski that he "made" Susan, the deceased. (R. 359).

Some time around midnight on the night of September 14, 1964, the defendant took his wife home and he and Norman Balcomb and the deceased proceeded from Conneaut to Ashtabula. During the course of the evening and ending at or about midnight the deceased had eaten most of two bags of pretzels (R. 925) at a bar and grille. During that time the defendant had made comments regarding the switching of partners. (R. 293). At the time the comments were made, Balcomb was with the decedent and the defendant was with his wife. During the course of the evening Susan Osborne had consumed several drinks as had the defendant and Norman Balcomb. Norman Balcomb attempted to make advances on the deceased in the car on the way to Ashtabula, but was essentially unsuccessful. The defendant left Norman Balcomb out of his automobile near Balcomb's home in Ashtabula on September 15, 1964 at about 12:15 A.M. The deceased got into the front seat of the defendant's car as they left Balcomb.

The defendant's wife testified that the defendant returned home at approximately 1:30 A.M. and that she had never left the house. The testimony was controverted by the rebutal witness, who

testified that the wife left the house at about 3:10 A.M. The defendant's wife stated that the defendant told her at about 1:30 A.M. that the deceased had jumped out of defendant's car near the General Hospital in Ashtabula and had not returned to Conneaut with the defendant. However, on the following day when Mrs. Kent went to the defendant's home she was told by the defendant's wife that she and her husband had left the deceased out of the automobile in Conneaut at about 12:00 the night before. (R. 241). The defendant's wife also admitted that she told the police the same story about letting the deceased out in Conneaut. (R. 685). On the same evening of September 15, 1964, the evening of the morning following the murder, defendant and his wife went to the home of Norman Balcomb where they told Balcomb, out of the hearing of other persons present, that Susan was missing, and that if Balcomb was questioned by the police about her being missing, he should tell the police that Mrs. Pruett had come to Ashtabula with Balcomb and Mr. Pruett and that they had left Susan in Conneaut. (R. 307). The defendant had been visibly upset at work at Manpower Institute as testified to by several witnesses on the working day of September 15, 1964, and he had left work from about 10:00 A.M. to 2:00 P.M. on that day.

On September 15, 1964, following the death of the deceased, the defendant had a small cut, not a half inch in length, on the knuckle of his right hand. (R. 405). The following day, September 15, 1964, the defendant told a working companion, George Temple, that in taking the deceased girl from Conneaut to Ashtabula, his wife had accompanied him. (R. 406).

On Saturday, September 19, 1964, the day that the body of the victim was found, the Pruetts stayed the night in Ashtabula with the Balcombs. The following day the Pruetts moved from Conneaut to an apartment that they had rented in Ashtabula. They moved their belongings in boxes in the 1953 Ford.

Upon determining that Norman Balcomb had been with the deceased

on the last evening that she was seen, the police interviewed Balcomb and advised them that the defendant had been with the deceased after he had left the defendant's vehicle. The officers went to the home in Ashtabula where the Pruetts had moved and asked the defendant to come to the Station to talk to them. (R. 444). Defendant voluntarily went with the officers to be questioned. He told his wife that he would return in about two hours after being questioned. (R. 690). The defendant was questioned by Detective Harold Roach at the Ashtabula Police Station. Detective Roach's testimony on the subject commencing at (R. 448) is as follows:

"A I explained to Robert at this time of the investigation that we were working on and that it pertained to the death of a 17 year old girl, known as Susan Osborne, from Conneaut. I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and wanted to tell me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he tell me about it."

"Q What did he say to that?"

"A Robert Pruett stood there for quite some time with his head bowed and again I asked him if he had been in the area over there, the Whitman's Creek area on Lake Road and if he wanted to tell me about it. Well, again he stood silent for, oh, maybe a minute and finally he said, 'Yes, I did drive the girl over there.' He said, 'We went east on Lake Road to Whitman's Creek.' And I said, 'What did you do after you got to Whitman's Creek?' He said, 'I parked on the south side of the road. I turned to the right.'"

"Q. I didn't hear that."

"A He said he turned to the right in this parking area off of Lake Road and I said, 'Well, how did you park, Robert"' 'Well,' he said, 'I turned around in this area.' And then I asked him what direction the car would be when he parked. 'Well,' he said, either the lake or Lake Road, the head of the car, the front of the car.' And I asked him how long he was there and he said, 'I don't know."

"Well, what did you do while you were there.' I asked him. He said, 'We talked and I drank a can of beer.' And I asked him what kind of beer this was and he said, 'Genessee.' I asked him if she drank any beer and he said no. After he drank the beer he said he threw the can out of the driver's side of the car and again I asked him what happened then. And he said, 'I made a couple of passes at her and she got out of the passenger side of the car.' Again I asked him what happened."

"He said he slid across the seat and got out the same side. I said, 'Go ahead, what heppened then?' He said, 'An argument started."

"About this time a police officer from Conneaut came through the hallway to Robert's right and at this time Robert had his head bowed. This was the position in which he was talking to me and evidently he noticed the officer come around the corner and immediately Robert says, 'I didn't do it.' He repeated it twice.

"At this time I told Robert that I was going to have to arrest him and take him to Jefferson."

"Q This was Sunday now, wasn't it?"

"A Yes sir."

"Q What time was this again?"

"A This was shortly before noon."

On the same day, Sunday, September 20, 1964, Detective Roach returned to the scene of the crime and thoroughly searched the area. (R. 452). In the search of the entire area, they found only one Genessee beer can and that was located next to the driveway about 25 to 30 feet from where the body of the deceased was found. (R. 452, 453).

On the afternoon of September 20, 1964, the Sheriff was advised that the defendant had a 1953 Ford automobile in which he had driven the deceased to the scene of her death and he ordered the car impounded (R. 463, 464), because "it was an instrumentality in the commission of this crime". (R. 464).

This vehicle could not be located at defendant's residence in Ashtabula, Ohio, however, it was later learned that defendant's wife had requested Balcomb to take this 1953 Ford automobile to Balcomb's residence, which was done. Shortly thereafter, Balcomb called the police and requested that the vehicle be removed from his residence. Thereafter, the vehicle was impounded and was in custody until the time of the trial. Upon a search of the vehicle, on the day following the arrest of Pruett, Detective Roach found a spot on the seat cover and on the grille cover of the car radio. (R. 485 to 487). These spots were later analyzed by a chemist for the Federal Bureau of Investigation, who found each spot to be human blood. The blood on the radio grille could not be typed (R. 569), but the blood on the seat cover was typed B, (R. 579), the same as the deceased.

Regarding the eating of pretzels by the deceased and the time for digesting the same, the record disclosed that the decedent con-

sumed two bags of pretzels between 11:35 P.M. and about midnight. (R. 342). The Coroner testified that it would take approximately two hours for the pretzels to be digested (R. 163) or less, if they had been chewed. (R. 169). Dr. Dixon testified that digestion could have taken place within an hour. (R. 219). The decedent lived at least 45 minutes after she was attacked. (R. 149).

REASONS FOR DENIAL OF THE WRIT

FIRST REASON

The defendant claims that the search and seizure of defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution and sets forth verbatim said Amendment.

The Court's attention is directed to the use of the word, unreasonable, in said Amendment and it is hereby submitted on behalf of the State of Ohio that the search and seizure herein made was not unreasonable as will be more fully explained hereinafter.

In this case the defendant was requested by police officers to go with them to the Ashtabula City Police Department for questioning concerning the death of one Susan Osborne. At this point the police officers were in the investigatory stage of this investigation with no focus of guilt or involvement in the crime being directed towards the defendant. Defendant voluntarily went to the Station House and believed that he would be returning home shortly because he so advised his wife. The actual arrest of the defendant came only after he made a statement to the police officer concerning his involvement. The defendant's automobile had been moved from his residence to another location, however, the police officers seized same at a time substantially contemporaneously with defendant's arrest, which was on a Sunday afternoon, and searched the automobile on the following day, and as the evidence indicates, said officers found evidence of blood in the automobile matching that of the victim.

The defendant relies heavily on decisions of the United States Supreme Court, Stoner v. California, 376 U.S. 483, 11 L ed 2d 856; Preston v. U.S., 376 U.S. 364, 11 L ed 777 and State v. Bernius, 177 O.S. 155, however, it should be noted that in the Stoner case the problem involving the Supreme Court was one of consent to search being given by a person other than the occupant of a hotel room in the Preston case an arrest for vagrancy and a subsequent charge of conspiracy to rob a Federally insured bank, and in the Bernius case the problem involved was an arrest for changing lanes in volation of a city ordinance and a subsequent trial on the charge of having unlawfully in his possession or under his control obscene, lewd or lascivious photographs.

It is hereby submitted that none of the factual situations contained therein are applicable to the present case.

It is noted with interest that in the Preston case, pages 366-367, the Court said,

> "....Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to the questions arrising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar."

The Supreme Court of the United States and the State Courts have historically held that each case is to be decided on its own facts and circumstances. Se Go-Bart Importing Company v. United States, 282 U.S. 344, 357.

With regard to the "mere evidence rule" as alluded to by defendant in his petition, it should be noted that in United States v. Rabinowitz, 339 U.S. 57, 94 L ed 653, the Court held that there is a right to search incidental to arrest and that such searches turn upon the reasonableness under the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. The relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable.

It is unclear as to whether the "mere evidence rule" is a constitutional requirement which is binding on the States. Recently

two different states have held the rule inapplicable to the States, while another has limited it to apply only to private papers and books and not to tangible objects such as a pair of shoes. Thus tangible objects could be seized even though they did not fit into the recognized types of seizable items. See People v. Thayer, 408 P. 2d 108 (1965); People v. Carroll, 238 N.Y.S. 2d 640 (1963).

In United States v. Ventresca, 380 U.S. 102 13 L ed 2d 684, the Supreme Court of the United States observed in a footnote in discussing exceptions to search warrants:

> "The exceptions are illustrated by cases in which seizure is impossible except without warrant", Carroll v. United States, 69 L ed 543, 553....such as a search of a moving object where 'it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality of jurisdiction in which the warrant must be sought."

A recent pronouncement of the United States Supreme Court on the "mere evidence rule", is contained in Warden, Maryland Penitentiary v. Bennie Joe Hayden, 18 L ed 2d 782, wherein the Court at pages 788 states:

> "The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by Courts and commentators." The Court of Appeals, however, felt 'obligated to adhere to it'. We, today, reject the distinction as based on premises no longer accepted as rules governing the application of the 4th Amendment."
>
> At page 793 of the Warden case, the Court also states:
>
> "The rationale most frequently suggested for the rule preventing the seizure of evidence is that 'limitations upon the fruit to be gathered tend to limit the quest itself.' But privacy 'would be just as well served by a restriction on search to the even-numbered days of the month....And it would have the extra advantage of avoiding hair-splitting questions....'. The 'mere evidence' limitations has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate....' The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."

The Supreme Court of the United States was confronted with a similar problem concerning search and seizure as is now present in the case of Joe Nathan Cooper v. State of California, 87 S.Ct. 788, decided February 20, 1967, wherein the petitioner was convicted in a California State Court of selling heroin to a police informer. The conviction rested in part on evidence seized by police from the petitioner's impounded automobile, without a warrant, during a search which occurred one week after the arrest of petitioner.

The Court stated that this case is neither Preston nor controlled by it. The officer seized the automobile because of the crime for which they arrested the petitioner. Their subsequent search of the car was closely related to the reason petitioner was arrested, for the reason his car had been impounded, and the reason it was being retained.

The Court further stated that "It is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to obtain a search warrant, but whether the search was reasonable". See United States v. Rabinowitz, supra.

The Trial Court below held that the seizure of the vehicle in question was permissible, because the vehicle was the implement or an instrumentality used in the commission of the crime and the Court's final ruling upon the Motion to Suppress beginning at page 151 of Vol. 1 of the record is as follows:

> THE COURT: At the previous hearing on this issue while no issue was made of it, the matter wasn't raised, technically I doubt if there is any showing in the record that there was even a lawful arrest of the defendant at the time we are considering. That issue wasn't raised.
>
> At the previous hearing also, there was a showing as to why the car was taken, and of course, it was shown without question it wasn't taken until after the arrest. Well regardless, I should say without reviewing the reasons in the testimony as shown previously with reference to the taking of the car, the most that can be said, as I recall -- I'm pretty sure I'm right on this -- as to why the car was taken were two points. It was found the car had fictitious license plates and the Sheriff also testified he ordered it picked up following a conversation with his deputies.

Now on the strength of that showing I ruled that the seizure and subsequent search was unlawful. My reason was this: Not because of the no showing of the arrest -- no contention was made for that -- but.....

MR. H. NAZOR: We admit he was arrested at the time.

THE COURT: There is no question about, there was no question then made, and there can't be any serious question now made that the arrest at that time was lawful; but admittedly the seizure was after the arrest. It was not commensurate in time with the arrest and at that time there was no showing made as to a plausible reason or excuse for taking the car.

The Sheriff has no right to pick up a motor vehicle parked on private premises because he learns that it has fictitious plates on it. Whether he can take it out on a highway is another point. That is not now to be decided.

Well, it now appears that the reason for taking this car, which probably was the reason the Sheriff referred to but didn't elaborate at the prior hearing, was as Detective Roach has testified, namely, that the defendant told him that he had transported the deceased to the particular place where she was found, in this car.

Now admittedly the seizure with the follow-up examination or search of the car was made with knowledge of that information and, of course, made without a warrant authorizing its search and seizure. So as I see it, the issue is where there is a lawful arrest and probable cause to believe that a motor vehilcle has been used in connection with the commission of the crime -- not necessarily the instrumentality alone by means of which the death is caused, but the automobile which the officers believe was used in connection with the commission of the crime -- may the automobile be seized without having to commit an unlawful search to get it, for instance breaking into a garage?

There isn't any question but what under the facts of this case the car was actually seized without committing a trespass as far as this defendant is concerned, unless the officers had no right to make the seizure at all.

As I view it now, the issue really is this. Following a valid arrest of this defendant and his having made the statement to the officer that he did, may they lawfully seize this car thereafter and search it?

Well, as I understand the rule, and even in the light of the latest Supreme Court cases dealing generally with this subject, as I read them -- and I think I have read all that counsel have cited and some besides -- I don't think the rule as previously announced has been abridged by those cases, and the rule long has been announced in many, many cases, many, many annotations, as I understand it, the rule is as follows: "That where a lawful arrest is made, a search of the person and of the place where the arrest is made may be had...." That isn't what we are dealing with right now, of course. "And the officers may seize and hold property so found which they reasonably believe is connected with the crime charged, no search warrant is needed to authorize seizure of such articles."

Now the officers did not take the defendant from the car, so it might well be argued that the officers couldn't take the car, pinned closely to only the language of such a rule; but I believe that is backed up by -- and almost without question -- these cases, many of

them in these annotations that I have noted where the officers believe that the car is used in connection with and may bear evidence of the commission of the crime for which the lawful arrest is made, they may make the seizure of the property if they do not have to commit an unlawful search to get it. And in this case there was no unlawful search of any premises to get this car, at least nothing unlawful so far as the defendant is concerned.

If we are to say that the officers can't seize the car when they can do so without committing a breach of the peace, if it is to be said that the officers cannot take in order to produce proof of guilt of the defendant under the circumstances here shown, then in my judgment an entirely new rule will have to first be written. I don't read any of the United States Supreme Court cases that way.

There are many of them dealing with this subject in use of evidentiary matter only; however, on examination I find those to be cases dealing not with the seizure of articles by which proof of the crime for which the arrest has been made -- the proof will be had -- but of some other offense. And by and large those cases hold that if the possession of that other evidentiary article is unlawful and hence the article by reason thereof is contraband, even then it may be used. But if it is not, and if the seizure is made as an evidentiary seizure only, in some other case beyond and different than the one for which the arrest is made, such an article thus seized may not be used. That again is not our situation here.

It is my opinion the seizure of this car under the facts shown was justified and the motion to suppress will be overruled.

MR. H. NAZOR: Are you ruling that our motion to suppress any evidence taken from the car is overruled too?

THE COURT: Yes sir.

MR. H. NAZOR: Very well.

THE COURT: I think that follows as a matter of course. If the right to seize the car exists, the right to examine it follows and the right to use the results of an examination or search -- call it what you will. And the first issue as I see it, did they have a right to seize the car? I think they did. Therefore, I think they had a right after the lawful seizure, certainly, to examine it.

SECOND REASON

We believe that the defendant must concede that the State is entitled to have the evidence interpreted most favorably to it as the jury verdict was rendered in favor of the State. The testimony of Detective Roach, as it was given, is as follows:

> "I told him that I knew that he had been in the presence of this girl and how terrible this crime is, and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this, it would be best if he would tell me about it." (Emphasis added)

Throughout defendant's argument on this point he has contended that he was under arrest at the time his statement was made. The evidence emphatically refutes such contention. There can be no doubt that the defendant expected to be questioned by the police. By his own testimony he had discussed with Norman Balcomb what story would be given to the police when they were questioned. When the police came to the defendant's home to question him, he went voluntarily. This statement is not only supported by the officers involved, but by the testimony of the defendant's wife that he would return in a couple of hours. (R. 690). The officers did not wish to detain the defendant and the defendant did not believe that he was being detained. A succinct and often followed definition of arrest is found in State ex rel. Sadler v. District Court, 70 Mont. 378, 225 P. 1000:

> "To constitute an 'arrest', four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested.".

See also State v. Milam, 108 Ohio App. 254, 268, wherein the above definition was quoted with approval.

The body of the deceased girl had been found the evening before the questioning of the defendant. The defendant's name and address were received from Norman Balcomb who was at that time being questioned at the police station. The purpose of the investigation and the questioning of the defendant was strictly investigative, and at that time had nothing to do with accusation. The statement of Detective Roach to the defendant clearly supports this fact.

After being arrested, while still at the Ashtabula Police Station, the defendant's wife called him. The police permitted the defendant to talk to his wife on the telephone. (R. 690). This act is totally inconsistent with defendant's claim of an inquisition as being held incommunicado.

The well established rule laid down by the United Supreme Court in Henry v. U.S., 4 L ed 2d, 136, is that:

> "An arrest is made the moment a man's movements are restricted and not when a formal arrest is made."

The defendant here did not believe that his movements were restricted. He told his wife as he left with the officers that he would return in approximately two hours. Detective Roach did not restrict the defendant's movements as he testified that he went to the police station in order to talk to the defendant, and that there was no room available to his knowledge for a discussion, so they spoke in an open corridor in a locker area at the Ashtabula City Building. The defendant was not under arrest at the time of making the incriminating statements to Detective Roach.

The defendant has cited many familiar and leading cases of the United States Supreme Court and other Courts, which in recent times has had occasion to discuss the fundamental constitutional rights of a prisoner in greater detail than was done in the past. Rather than burden the length of this brief with discussion of each of these cases, we believe it sufficient to examine Escabedo v. Illinois, 378 U.S. 478 (1964) and Mallory v. U.S., 354 U.S. 449. The Escabedo case as cited by the defendant at page 15 of their petition holds "....When its focus is on the accused and its purpose is to elicit a confession", an accused must be permitted to consult with an attorney. In the instant case the accused was advised of his rights to consult with an attorney. He was advised that he could seek any help he desires. Furthermore, he was not an accused. It must be apparent to the Court that at this state, early on a Sunday following the Saturday evening discovering of the body, the police were seeking information, simply investigating the killing. By simple view of the body, they knew that they had a murder.

In the Mallory case, the defendant was arrested on suspicion of rape. The Court said that the arrested person could be booked by the police but thereafter an inquiry, designed to elicit damaging statements to support the arrest, could not be conducted. In the instant case, the defendant, Pruett, was not arrested, nor was an inquiry had to attempt to elicit damaging statements. As the defendant repeatedly points out, Detective Roach did not even have

a witness with him when questioning the defendant, nor was he attempting to write down the statements made by the defendant. Certainly, Detective Roach, who had been a police officer for many years, knew that if he sought damaging statements from a person, to be used against him to prove his guilt, said statements would be more convincing if there were other witnesses present when the statements were made, and if then reduced to writing. The fact that there were no other witnesses, and that he was not taking notes, clearly indicates that he was investigating the matter and was not attempting a Star Chamber proceeding, as is implied by the defense.

There is presently a mild clamour in law enforcement circles regarding the rulings of the Court as to rights of a person under the Bill of Rights. Law enforcement officers sometimes contend that to grant to a party the right of counsel and other constitutional rights presumably curtail their effectiveness. Regardless of the validity of this argument, this Court must be aware that to hold that under the circumstances of the instant case, the actions of Detective Roach violated any constitutional right of this defendant, requires this Court to hold that a police officer may never use a statement made by a person which incriminates that person. In the instant case, there was no confession. The police officer was investigating an apparent murder. He was talking to a person who was reportedly the last person to be with the deceased. He stated he had not arrested this person, and the person, by his comments to his wife, indicated that he did not believe he was being detained. There is no case which holds that the admission against interest made by the person not being detained may not be admitted in a Court of law.

While we believe it was not necessary under these circumstances, certainly the fact that Detective Roach advised the defendant that he could talk to an attorney or could seek other help completely abrogates any sinister or accusatory motive on the part of this

officer and would comply with the constitutional requirements had the defendant been under arrest.

It should be noted that the defendant relies heavily on principles of law set forth in Alexander v. Green 2 O.S. (2d) 231, 31 O.O. (2d) 231, however, a cursory reading of this case indicates that in the Alexander matter a statement was elicted from the defendant after arrest, and is, therefore, distinguishable from the present matter, because statement was given prior to any arrest.

THIRD REASON

The defendant here contends that the defendant was not afforded a fair and impartial jury because of prejudice on the part of a juror. The State agrees that the defendant was entitled to receive a jury consisting of impartial members of the public. Defendant received such a jury. In his motion for a new trial filed below, the defendant contended that one of the jurors was prejudiced in spite of the fact that that juror was interrogated by counsel for the defendant on the voir dire examination, admitted that he had heard comments regarding the case, and denied that he had at that time formed an opinion as to the case. The defendant attempted to show this prejudice on the part of that juror by affidavits and testimony of other members of the jury panel. There was no outside evidence produced whatsoever.

On the basis of this showing, the Court below in essence refused to consider the claim of prejudice complying with that doctrine predicated on public policy that a verdict of a jury cannot be im-

peached solely by the testimony of its members or of the panel. Thus, contrary to the impression given in the petition of the defendant, the Court below did not rule that the juror charged with prejudice was free of prejudice, but the Court ruled in essence that there was no evidence upon which a hearing into that matter could be had.

The Trial Court's opinion on this matter set forth in its Opinion on a Motion for New Trial, noted in Petitioner's Appendix pages 6, 7, 8, 9 and 10 is as follows:

> "Under its claim of misconduct of the jury, the defense sought to prove what it claimed amounted to misconduct of the jurors and sought to do so solely through evidence by way of an affidavit of one of the jurors and the oral testimony of another. No evidence aliunde or dehors the proposed testimony of the jurors was offered. The Court rules such evidence inadmissible. The claim is made that since the acts amounting to claimed misconduct occurred outside the Jury Room, or at least prior to the final submission of the case, that the usual rule of aliunde evidence is not applicable and that the jurors themselves may be called directly to testify concerning such matters and in this way thus impeach their verdict.
>
> Before proceeding further, it should be pointed out that the claimed misconduct, if it were such, deals only with the communications of the jurors among themselves, that is to conversations concerning evidence admitted upon the trial and not in any way touching upon an outside communication or factual matters not in evidence. The rule has long been adhered to in this state that affidavits of jurors stating matters of alleged misconduct are not competent to support an application for a new trial unless evidence aliunde is first offered or unless the Court has acquired knowledge of the Jury's behavior from other sources. 16 OJ 2d 56. True, in most instances where the issue has arisen, efforts have been directed toward uncovering what went on in the Jury Room after final submission or with claimed communications with the jurors by outsiders, as distinguished from what is claimed to have transpired before final submission of the case. Examples of this type of cases in Ohio are Farrer v. State, 2 OS 54; Kent v. State, 42 OS 426; Schwindt v. Graeff, 109 OS 404; Wicker v. Cleveland, 150 OS 434; and State v. Miles, 69 NE 2d 39. The rule is one of deep seated public policy to the effect that testimony or affidavits of jurors themselves will not be received for the purose of impeaching the verdict, at least until other evidence on the subject is first offered.
>
> Whether the claimed misconduct occurred before or after final submission of the case to the jury, the policy involved would be violated in either event if the jurors alone were allowed to thus impune the verdict. Panel

members become jurors immediately upon being sworn. The finality of jeopardy then attaches and the jurors certainly do not don a different cloak when the case is finally submitted. This Court believes the rule should be the same whether the claim of misconduct occurs before or after final submission of the case. Such seems to be the general rule and the following are just a few of the many cases on the point. State v. Ferguson, 182 SW 2d 38; Huddleston v. State, 64 Southern 2d 90 (Ala.); Gossett v. State, 48 SE 2d 71 (Ga.); State v. Finnell, 280 SW 2d 110 (Mo.); Lindsey v. State, 25 SW 2d 533 (Tenn.); People v. Evans, 246 Pac. 2d 636 (Cal.); State v. Oliver, 192 Southern 725 (La.); and State v. Ingersoll, 292 Pac. 250 (Mont.). Such will likewise be the ruling of this Court. See Locicero v. State, 14 Abs. 109.

Under the rule barring testimony of jurors to impeach their own verdict, it is nevertheless almost universally held that testimony of jurors, however, may be admitted to sustain the verdict and this procedure is resorted to most often when a prima facia showing of misconduct is first made; but in the present case, since the Court has ruled that the affidavit and testimony of the two jurors are inadmissible to impeach this verdict, the State's affidavits of thirteen jurors, seeking to sustain the verdict by showing no misconduct, are irrrelevant."

"Next it is argued that the defendant did not have a fair and impartial jury as required by the constitution for the reason that juror Gillespie had a prior fixed opinion that the defendant was guilty and withheld disclosure of such opinion upon inquiry on voir dire. In support of this contention, reference was made to the voir dire examination, and the affidavit and oral testimony of propective juror Osborne were offered and admitted in evidence. In the opinion of the Court, the contention of the defense is not supported in either respect. In the first place, questions put upon voir dire clearly indicated that the juror had discussed the case pro and con, that opinions on guilt or innocence had been expressed, and indicated he may have expressed such an opinion himself. He did, however, answer unequivocally that he had no opinion as to guilt or innocence as he was then questions."

"Osborne's affidavit is direct and positve and by its language certainly would tend to indicate a false answer on the part of Gillespie when inquired of on voir dire examination. The Court, however, recognizes, as well he must, that the affadvait is in the language of defense counsel and not necessarily in the language of the witness. Osborne's oral testimony regarding the same subject, on the other hand, is much less specific, somewhat equivocal, and indicates the possibility that whatever he heard may have been spoken by one of four in a group of prospective jurors, two of whom were excused upon challenge for cause because they held fixed opinions on either guilt or innocence."

"Osborne was positive that some of the conversation he attributed to Gillespie took place on Wednesday, the third day of trial, whereas the minutes of the trial show that both were called into the Jury Box on Tuesday, the second day of trial, and Osborne was then excused because he had a very definite opinion in opposition to capital punishment. Osborne admits that he had no direct conversation with Gillespie but claims the statements attributed to him were remarks that he overheard in a group conversation."

"Gillespie categorically denied any such statements as attributed to him by Osborne and various others of the prospective jurors in company with Osborne and Gillespie in the assigned place for the meeting of the prospective jurors deny hearing any such statements from Gillespie. The Court fails to find under this state of the evidence that prospective juror Gillespie testified falsely upon voir dire and further holds that the defense has not sustained its burden of proof in this regard."

FOURTH REASON

As to the contention of the defendant that the Court erred in permitting the amendment to the indictment, this Court's attention is directed to the preceeding statements of facts and to page nineteen (19) of Petitioner's petition, where the amendment to the indictment is set forth. In essence, the Trial Court permitted the State to amend the indictment by adding the words "or attempting to perpetrate rape" after the words "while in the perpetration of a rape" in the indictment. Defendant claimed below and here claims that the addition of such language constituted the addition of a second charge or a new crime to the indictment. In the case of Bryant v. State of Ohio, 48 App. 208, Hamilton County 1933, appeal dismissed 127 O.S. 593, the Court of Appeals for Hamilton County, considering the statutory authority granted the Trial Court, and found in Section 2941.30 Revised Code, (quoted in part on page 19 of Petitioner's Petition), found no error in the Trial Court's allowing the State to amend an indictment, from murder while committing a robbery, to murder while attempting to commit a robbery. The Court said at page 210 of that decision:

"The first question presented involves the nature of the amendment. Was there any change made in the name or identity of the crime charged? We conclude that there was no such change. The crime charged originally and in the indictment as amended was murder in the first degree. Of this crime the defendant was con-

victed. Even if such were not our conclusion, it is obvious from a reading of the record that the defendant was not misled or prejudiced by the variance in respect to which the amendment was made, nor has any failure of justice resulted."

A similar conclusion reached in the case of State v. Holt, 59 O. App. 309, Court of Appeals for Franklin County, (1938).

If the Trial Court had not permitted the amendment and the defendant had been acquitted, there can be no doubt that a trial on a later indictment alleging murder while attempting a rape would constitute double jeopardy.

Section 2941.30 Revised Code, grants a Trial Court authority to permit an amendment to the indictment in form or substance, provided only that there may be thereby made no change in the name or identity of the crime. The defendant was charged with the crime of murder in the first degree and the amendment herein permitted in no way changes that charge.

The second contention of the defendant regarding the amendment to the indictment is that the granting of such amendment was not supported by facts and therefore the Court had no authority under the statutes to permit the amendment. The amendment was one from a killing while perpetrating a rape to a killing while attempting to perpetrate a rape. At the time the amendment was permitted there had been introduced the medical testimony set forth in the statement of facts and the photographs taken of the body of the deceased. The deceased lay in a hardened pool of her own blood. She was on her back and her legs were spread. The body was nude. Her coat was spread under her buttocks. There was a stab wound in her chest from which blood had flowed over her shoulder, clearly indicating that the blood was flowing from the wound as she lay. There was blood on her blouse and a cut in its material indicating that she was stabbed while wearing the blouse. Her face was crushed. Medical testimony concluded that there had been intercourse, but this conclusion was based upon a finding of acid phosphatase with no spermatozoa. Under this state of the evidence, there can be no

doubt that the Court was fully warranted in permitting the amendment to include attempt of rape which simply excluded the need to prove penetration. There is no other conclusion that any reasonable mind could draw from these facts.

Regarding the cases cited by the defendant in support of his contention, the State has never claimed and does not now claim that it was attempting to add vital or material elements of the offense. The matter added to the indictment does not accomplish this end. The citations are, therefore, of no effect in determining the point raised by the defendant.

FIFTH REASON

Here, as in the earlier assignments of error, the defendant's argument is predicated upon a misconception of the evidence. The defendant and his wife had testified on behalf of the defense, that the defendant had come home at approximately 1:30 A.M. on September 15, 1964, and that she and the defendant remained home the rest of the evening. Mrs. Rosemary Karr testified in rebuttal that she had seen the defendant's wife leave the home at approximately 3:10 A.M. on the same morning. This testimony was clearly in reply to the testimony given for the defense and as such was proper rebuttal testimony, 52 O.Jur. 2d, 561, Trial, Section 75.

At page 24 of his petition, the Petitioner cites the case of Itskin v. State, 51 App. 211 (1953), for the proposition that there exists in Ohio the right in the defense to submit surrebuttal in answer to rebuttal. The same contention is made by the defense for the case of State v. Lett, 106 App. 285 (1958). Section 2945.10 Revised Code providing for the order of proceeding in trial, grants no right of surrebuttal, and reads in pertinent part as follows:

> "Trial of an issue upon an indictment or information shall proceed before the Trial Court or jury as follows:...
>
> (D) The State will then be confined to rebutting evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.....

The Court may deviate from the order of proceedings listed in this section."

This specific statutory procedure was followed in the instant case and in an effort on the part of the Trial Court to grant wide latitude to the defendant, the Court permitted the defendant and his wife to testify as surrebuttal witnesses.

As stated above, the defendant's claim rests upon the ill-conceived premise that the rebuttal testimony was improper because, at least in the view of the defendant, it had a tendency to prove that he, the defendant, did not return home when he said he did. It is submitted that even if this be so, such evidence is proper rebuttal evidence. In this regard the Court's attention is directed to the third paragraph of the syllabus of the case Holt v. Ohio, 107, O.S. 307, which reads as follows:

"Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the Court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground."

The Trial Court, in its Opinion to a Motion for New Trial, as set forth in Petitioner's Appendix pages 5 and 6, stated with regard to the permission given the defendant and his wife to testify in surrebuttal:

"The Court permitted the defendant and his wife to testify, as above noted. The Court's reasoning at the time was substantially this, that an explanation as to why the wife left the house at that hour ought to be allowed. Of course, she denied rather than explain it. This is not to say, however, that because the Court exercised its discretion in that direction with reference to that possible testimony the Court was required to back up and thereafter allow the introduction of the photographs and other testimony above referred to, or having barred the photographs and other testimony in denial of the witness Karr necessarily meant that the denial should

carry through to the wife and the defendant and thereby bar the possible explanation of her leaving the house. It should be kept in mind that the issue of fact was first raised by the defense testimony and not during the State's case in chief. It does not seem that the point of abuse of discretion is well taken."

The statute grants the State a right to rebut. The defense wanted to bring in witnesses and testimony not to deny, but to cast doubt, photos at angles, witnesses who did not hear anyone go out, and amateur weathermen. If the Court granted that, then could not the State bring in photos from different angles, an expert weatherman, and perhaps someone who heard a door close: The trial must end and the statute says it ends at rebuttal unless the Court permits otherwise.

There is no abuse of discretion on the part of the Trial Court.

SIXTH REASON

The question as to whether or not the imposition of the death penalty is cruel and unlawful punishment and, therefore, violative of the Eighth Amendment of the United States Constitution has been before this Court on numerous occasions. It should be noted that almost a century ago, In the matter of William Kemmler, Petitoner, 136 U.S. 436, 34 L ed 519, 10 S.Ct. 930 which was decided on May 23, 1880, the Supreme Court of the United States had before it the question of the constitutionality of a law of the State of New York, wherein it was declared that the punishment of death must be inflicted by causing to pass through the body of the convict a currenct of electricity of sufficient intensity to cause death.

The Court stated that:

"If the punishment prescribed for an offense against the laws of the State were manifestly cruel and unlawful, as burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the Courts to adjudge such penalties to be within the constitutional prohibition."

However, the Court ruled that "this Statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of these general rules prescribed by our system of jurisprudence; and the Legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its Courts have sustained that determination. We cannot percieve that the State has thereby abridged the privileges or immunities of the Petitioner, or deprived him of due process of law."

Concerning the imposition of the death penalty the following is noted in 30 ALR 1452;

> "The punishment of death is not in violation of the constitutional prohibition of cruel or unlawful punishment unless it is so inflicted that it involves lingering death, torture, or such practices as disgrace the civilization of former ages. So long as the death inflicted is speedy and without undue pain or torture, the provision is not violated." (See also Holt v. State of Ohio, supra.)

Therefore, the suggestion of the Petitioner that the death penalty be abolished in every state should be held for naught, and each State be allowed, as they have been in the past, to determine the manner and method of punishment for those who violate the law.

SEVENTH REASON

The question as to whether the exclusion of prospective jurors on the sole ground that they are opposed to capital punishment is violative of the Sixth Amendment to the United States Constitution has also been a subject of Court review on numerous occasions and has been ruled upon in the State of Ohio as far back as 1847. In the matter of Samuel Martin v. State of Ohio, 16 Ohio Reports 364, the Court stated:

> "When a juror states that he is on principle opposed to capital punishment, and that his opinion will influence his decision against the law and the evidence, he may be challenged by the State for cause."

Concerning the causes of challenging of jurors, it should be noted that Section 2945.25 Revised Code states the following

> "A person called as a juror on an indictment may be challenged for the following cause:
>
> (C) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death."

In 48 ALR 2d 563 the following is noted:

> "It is a general rule that the State, as well as the defendant, in the trial of crimes punishable by death, has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty."

It is, therefore, requested that Petitioner's assertion that such selection of jurors is violative of the Sixth Amendment be denied.

CONCLUSION

For the reasons hereinabove set forth it is respectfully submitted that the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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A copy of the within "Brief for the State of Ohio in Opposition" was personally delivered to the office of Nazor and Nazor, Ashtabula, Ohio, Attorneys for Petitioner, on the 20th day of May, 1968.

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